(3)

No. 86-1858

Supreme Court, U.S.
FILED
JUL 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY BRIEF

THOMAS W. GLEASON
26 Broadway, 17th Floor
New York, New York 10004
(212) 425-3240

Attorney for Petitioners

Of Counsel:

ERNEST L. MATHEWS, JR.

20pp

No. 86-1858

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY BRIEF

I

Respondent twice represents to this Court that petitioners, as defendants in the district court, never answered or otherwise responded to the amended complaint served on behalf of Allied Plywood Corporation ("Plywood"). Respondent's Brief In Opposition ("RB") at 3, 9. In fact, the defendants served their answer to the amended complaint on July 1, 1985. A copy of that answer appears at page 45a *et seq.* of the Joint Appendix in the court of appeals, App. 6-12, with its accompanying certificate of service at page 51a. App. 12. It is listed on the first page of the table of contents of the Joint Appendix. App. 2. The district court's docket sheet, reproduced at page 6a of the Joint Appendix in the court of appeals, also notes

the filing of the answer to the amended complaint as Nr. 123 on page 4. App. 4.[1]

In view of this documentation and of respondent's participation in the preparation of the Joint Appendix in the court of appeals, there can be no excuse or justification for respondent's misrepresentations to this Court. More important, the suggestion for which the untrue statement is offered as a predicate—the claim that petitioners were not denied their constitutional rights to assert defenses and to demand a jury trial—is untenable.

Petitioners did serve an answer to the amended complaint. Since petitioners were misled by the district court's handling of the motion to amend, their answer to the amended complaint was identical to their answer to the original complaint, with the exception of a single denial in Paragraph 2 (that Plywood is a Massachusetts corporation). App. 6. The answer to the amended complaint does not contain defensive material that would have been available against Plywood. See Petition at 11, 12. Petitioners had been led to believe that the amended complaint did no more than assert the cause of action assigned to Plywood by Allied International, Inc. ("International"). In that situation, defensive material that was available against Plywood but not against the assignor, International, in whose shoes Plywood stood, was irrelevant and does not appear in the answer.

Respondent's quotations from the June 12, 1985 hearing, RB at 8, n.1, do not undermine petitioners' showing of prejudice. The district court's remarks in no way resolve the ambiguity, since, if the amendment was solely to sub-

---

[1] The cited pages from the Joint Appendix in the court of appeals are reproduced as an appendix to this reply brief and are cited "App. —".

stitute Plywood as assignee, Plywood would still have the "recoverable interest" or the "continuity of interest" the district court alludes to. Quoting the district court's remarks does not change the fact that at the hearing the court labelled the suggestion that Plywood was asserting anything other than the assigned claim, "Bananas" and then, after trial, awarded over $6 million for damages not included in the assigned claim. Nor does respondent deny or overcome the facts that, when petitioner moved for clarification, so as to prepare a proper defense against any claim Plywood might be asserting on its own behalf, respondent assured both the court and petitioners that Plywood was asserting only the same cause of action asserted by International, and the district court did not modify its original view that all the amendment "does is change the name of the plaintiff." Appendix C to Petition at 30a.

Similarly, the colloquies from the trial transcript that appear as appendices to Respondent's Brief in Opposition fail to dispell the prejudice to petitioners. In each instance, the colloquy shows that petitioners were proceeding on the theory that what was at issue was the claim assigned to Plywood by International, not a claim in Plywood's own right. Consequently, petitioners consistently argued that damages accruing after the sale of assets were not recoverable by International and so could not form part of the assigned claim. See RB at A-3, A-6-A-7, A-12-A-15.[2]

---

[2] To the extent that the court of appeals held that International's claim, the assigned claim, could encompass damages for profits "lost" after International's voluntary sale of its assets, the First Circuit is in clear conflict with the Fifth and other circuits. *See* Petition at 15-16. Respondent's attempt to distinguish all the reported authority on the basis that here only lost profits were sought, rather than both lost profits and diminished sales price, is obtuse. Lost profits and diminution of sales price are two ways of calculating the same harm. Where, as here, a seller receives full value for its assets, there is no harm at all.

Respondent's attempt to perpetuate the canard that this case involves merely a straightforward application of Fed. R. Civ. P. 15, RB at 4-7, runs into a stone wall. If the amended complaint asserted no more than the assigned claim, no consideration of the "relation back" doctrine of Rule 15(c) would have been necessary. That the district court, the First Circuit, and now respondent were all impelled to undertake a relation back analysis proves that more was involved in the post-trial decision than the simple substitution of plaintiffs envisioned when leave to amend was granted.

The reiterated apology that the original complaint sought damages on behalf of International for the same time period for which damages were ultimately granted to Plywood is a deliberate evasion. The critical factor that created prejudice was not the time period but the identity of the injured party. Petitioners had defenses that were available only against Plywood, not International. By the shrouding of the identity of the plaintiff until after trial, petitioners were prevented from asserting those defenses, just as they were prevented from demanding a jury trial which would be available only if a new claim was also being asserted.

Respondent's efforts, then, only serve to underscore the extent to which petitioners were prejudiced. Having been told by both the court and their adversaries that the amended complaint only included the assigned claim, petitioners prepared and tried the case accordingly. They did not demand a jury trial because they had already waived that right with respect to the assigned claim. They did not plead or present defenses available against Plywood because those defenses would not apply to an assigned claim. Then, after trial, the district court awarded damages on the theory that the amended complaint asserted

not only the assigned claim but also a claim on Plywood's own behalf. For the First Circuit to permit recovery on a claim that was not merely unmade but actually disclaimed by plaintiff and the district court was a departure from norml judicial practice and a perversion of the Federal Rules amounting to a deprivation of constitutional rights, which cries out for correction by this Court.

II

The new material included in respondent's appendices also serves to underscore petitioners' demonstration of the conflict between the First Circuit's decision and the holdings of other circuits. Respondent urged to the district court the theory that the only continuity necessary is that "of the business". RB at A-12. The same notion was urged to the First Circuit and now to this Court. "As the district and circuit courts found, the Russian wood importing business never ceased, nor was it even altered. Rather, the business was transferred to a new owner and continued operation as before." RB at 11.

Respondent admits that the First Circuit upheld recovery on the basis of continuity of the business operation, not continuity of ownership. RB at 12. As pointed out in the petition, this ruling conflicts with the holdings of all circuits in every context but one. See Petition at 17-18. The kind of "identity" found by the court of appeals here has been utilized only to impose products liability on a purchasing corporation —an approach antithetical to well established labor law policies. See Petition at 18-19.

The First Circuit's decision necessarily involves an interpretation of Labor Management Relations Act § 303(b), 29 U.S.C. § 187(b), under which this case is brought. If harm to the business itself, as opposed to the legal entities which own and operate the business, will suffice for dam-

ages under § 303, the statutory language which grants a cause of action to "one who is injured in his business" undergoes a radical expansion. The ramifications for all organized labor need not be elaborated upon. Scrutiny by this court is required before any such novel and alien interpretation of federal labor law be accepted.

CONCLUSION

For the foregoing reasons as well as for the reasons set forth in the petition, a writ of certiorari to review the judgment and decision of the Court of Appeals for the First Circuit should be granted.

Dated: July 1, 1987

Respectfully submitted,

THOMAS W. GLEASON
26 Broadway, 17th Floor
New York, New York 10004
(212) 425-3240

Attorney for Petitioners

Of Counsel:

ERNEST L. MATHEWS, JR.

APPENDIX

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 86-1947

ALLIED INTERNATIONAL, INC.,
Plaintiff-Appellee,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO.
Defendant-Appellant.

No. 86-1987

ALLIED INTERNATIONAL, INC.,
Plaintiff-Appellee,

v.

LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOINT APPENDIX

(Volume I—Pages 1a to 881a)

THOMAS W. GLEASON
26 Broadway, 17th Floor
New York, New York 10004
(212) 425-3240
Counsel for Defendant-Appellant International Longshoremen's Association, AFL-CIO

NUTTER, MCCLENNEN & FISH
Federal Reserve Plaza
600 Atlantic Avenue
Boston, Massachusetts 02210
(617) 973-9700
Counsel for Plaintiff-Appellee

LECOMTE, BARBER, EMANUELSON, TICK & DOYLE
One Boston Place
Boston, Massachusetts 02108
(617) 523-4028
Counsel for Defendant-Appellant Local 799, International Longshoremen's Association, AFL-CIO

8092D

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 86-1947

Allied International, Inc.,

Plaintiff-Appellee,

v.

International Longshoremen's Association, AFL-CIO,

Defendant-Appellant.

No. 86-1987

Allied International, Inc.,

Plaintiff-Appellee,

v.

Local 799, International Longshoremen's Association, AFL-CIO,

Defendant-Appellant.

Table of Contents of Joint Appendix

	PAGE
District Court Docket Sheet	1a
Complaint	10a
Amended Complaint	25a
Answer to Amended Complaint	45a
Order of October 1, 1982 Granting Partial Summary Judgment	52a

[6a]

District Court Docket Sheet

DATE	NR.	PROCEEDINGS
1984		
Feb 9		SKINNER, D.J., re: #104 "Objection overruled. Request for hearing denied," entered, cc/cl.
1985		
May 2	105	Ps supplemental response to Ds 2nd set interrogatories, c/s.
29	106	Pltf's Mtn to compel Defts to supplement their answers to expert Intgs concerning Michael L. Selar and John Muench or, in the alternative, to limit and preclude expert testimony at Trial, filed, c/s.
29	107	Pltf's MEMO in support of #106, filed, c/s.
Jun 4	108	Deft's MEMO in Oppo to Pltf's Mtn to Compel, filed, c/s.
11	109	Deft's Mtn for Order to Compel Discovery, filed, c/s.
11	110	Affid in support of #109, filed, c/s.
11	111	Deft's Mtn for further Discovery concerning Expert Witness, filed.
11	112	Deft's MEMO in support of #111, filed, c/s.
12	113	Pltf's Mtn to Amend Complaint, filed, c/s.
12		Case ref to USM COHEN for all pending Mtns.

District Court Docket Sheet

DATE	NR.	PROCEEDINGS
12	114	SKINNER, D.J., SCHEDULING ORDER, All pending discovery Mtns are to be referred to the Magistrate for expedited action. All discovery will be completed within thirty days after the magistrate's Order on said mtns. The case is set for a pretrial conference on 7/29/85 at 2:00 p.m., entered, cc/cl.
13	115	COHEN, USM, PROCEDURAL ORDER, To the extent that such mtns are pend counsel for the moving party with respect to such mtns shall, by letter filed on or before 6/19/85, identify those mtns by name and docket number assigned by the Clerk. A hearing shall be held on those mtns on 6/25/85 at 2:00 p.m., entered, cc/cl.
19	116	Pltf's respnse to Deft's subpoena of 6/6/85, filed, c/s.
21	117	Pltf's response to Deft's Mtn for Order to Compel Discovery, filed.
21	118	Pltf's MEMO in Oppo to Deft's Mtn for further Discovery concerning expert witness, filed, c/s.
24	119	Deft's fourth Set of Intgs, filed, c/s.
25	120	Pltf's Mtn for Protective Order, filed, c/s.
26	121	COHEN, USM, ORDER, entered, cc/cl.
Jul 1	122	Pltf's Reqs for Admissions, filed, c/s.
5	123	Defts' Answer to Amended Complaint, filed, c/s.

District Court Docket Sheet

DATE	NR.	PROCEEDINGS
1985		
Jul 5	124	Amended Notice to Take Depo of Allied Plywood on 7/15/85, filed, c/s.
5	125	Deft's Third supplemental Answers to Pltf's Intgs, filed, c/s.
5	126	Deft International Longshoremen's Mtn for Reconsideration, filed, c/s.
5	127	Deft's MEMO in support of #126, filed, c/s.
8	128	Pltf Allied Plywood's response to Questions posed at the Depo of Morton Waldfogel on 5/22 and 5/23/83, filed, c/s.

Answer to Amended Complaint

[45a]

(pp. 45a-51a)

UNITED STATES DISTRICT COURT

District of Massachusetts

Civil Action No. 80-584-S

Allied Plywood Corporation,

Plaintiff,

v.

International Longshoremen's Association, AFL-CIO, et al.,

Defendants.

Answer to Amended Complaint

Defendants, by their attorneys, Doyle & Doyle and Thomas W. Gleason, answer plaintiff's amended complaint as follows:

1. As to paragraph 1 of the amended complaint, defendants admit that plaintiff is attempting to assert a cause of action under §303 of the Labor Management Relations Act, admiralty tort, and the Sherman and Clayton Antitrust Acts. Defendants deny that plaintiff has a cause of action under said statutes, under admiralty tort, or under any other rule of law.

2. Paragraph 2 is admitted, except defendants deny that plaintiff Allied Plywood Corporation is a Massachusetts corporation.

3. Paragraph 3 is admitted.

4. Paragraph 4 is admitted.

5. Paragraph 5 is admitted, except defendants deny that Thomas W. Gleason can be sued in his individual capacity by plaintiff.

[46a]

6. Paragraph 6 is admitted, except defendants deny that H.R. Hasselgren can be sued in his individual capacity by plaintiff and deny that H.R. Hasselgren is Secretary-Treasurer of the ILA.

7. Paragraph 7 is admitted, except defendants deny that John Bowers can be sued in his individual capacity by plaintiff.

8. Paragraph 8 is admitted, except defendants deny that Fred R. Field, Jr. can be sued in his individual capacity by plaintiff and deny that Fred R. Field, Jr. is General Organizer of the ILA.

9. Paragraph 9 is admitted, except defendants deny that Anthony Scotto can be sued in his individual capacity by plaintiff, and deny that Anthony Scotto is Regional Director of the ILA.

10. Paragraph 10 is admitted, except defendants deny that J.T. Moock can be sued in his individual capacity by plaintiff.

11. Paragraph 11 is admitted, except defendants deny that R.A. Massey can be sued in his individual capacity by plaintiff. Defendants affirmatively state that R.A. Massey is deceased.

12. Paragraph 12 is admitted, except defendants deny that George Dixon can be sued in his individual capacity

by plaintiff. Defendants affirmatively state that George Dixon is deceased.

[47a]

13. Paragraph 13 is admitted, except defendants deny that W.P. Lynch can be sued in his individual capacity by plaintiff.

14. Defendants admit that plaintiff is attempting to invoke the court's jurisdiction under 29 U.S.C. §187, 28 U.S.C. §133, and 15 U.S.C. §§1 and 15. Defendants deny that plaintiff has a cause of action under said sections or under any other rule of law.

15. Paragraph 15 is denied.

16. Paragraph 16 is denied.

17. Paragraph 17 is denied.

18. Paragraph 18 is denied.

19. Paragraph 19 is denied.

20. Paragraph 20 is denied.

21. Paragraph 21 is denied.

22. Paragraph 22 is denied.

23. Paragraph 23 is admitted except defendants object to the characterization of the January 9, 1980 telegram as a "directive."

24. Paragraph 24 is denied.

25. Paragraph 25 is denied.

26. Paragraph 26 is denied.

27. As to paragraph 27, defendants admit that the refusal of longshoremen to service Russian ships or handle

Answer to Amended Complaint

Russian cargo received some publicity but deny that they encouraged publicity or that the publicity was widespread.

[48a]

28. Paragraph 28 is denied.

29. Paragraph 29 is denied.

30. Paragraph 30 is denied.

31. Paragraph 31 is denied.

32. Paragraph 32 is denied.

33. Paragraph 33 is denied.

34. Paragraph 34 is denied.

35. Paragraph 35 is denied.

36. Paragraph 36 is denied.

37. Paragraph 37 is denied.

38. Paragraph 38 is denied.

39. Paragraph 39 is denied.

40. Paragraph 40 is denied.

41. Paragraph 41 is denied.

42. Paragraph 42 is denied.

43. Paragraph 43 is denied.

44. Paragraph 44 is admitted.

45. Paragraph 45 is denied to the extent that it repeats and realleges allegations which have been denied above.

46. Paragraph 46 is denied.

47. Paragraph 47 is denied.

48. Paragraph 48 is denied.

Answer to Amended Complaint

49. Paragraph 49 is denied.

50. Paragraph 50 is denied to the extent that it repeats and realleges allegations which have been denied above.

51. Paragraph 51 is denied.

[49a]

52. Paragraph 52 is denied.

53. Paragraph 53 is denied to the extent that it repeats and realleges allegations which have been denied above.

54. Paragraph 54 is denied.

55. Paragraph 55 is denied.

First Defense

56. The complaint fails to state a claim upon which relief can be granted.

Second Defense

57. The alleged conduct complained of by plaintiff arises or grows out of a labor dispute, and this court therefore lacks jurisdiction to issue any restraining order or temporary or permanent injunction with respect to such conduct.

Third Defense

58. The wood products which plaintiff allegedly sought to import into the United States were produced by forced labor. The importation and transport in interstate commerce of such products is unlawful. 19 U.S.C. §1307. Plaintiff is barred from seeking any relief in law or equity, by reason of defendants' refusal to handle such products.

Answer to Amended Complaint

Fourth Defense

59. The court does not have personal jurisdiction over Defendants Thomas W. Gleason, Harry R. Hasselgren, John Bowers, Fred R. Field, Jr., Anthony Scotto, James T. Moock, R.A. Massey, George W. Dixon, or William P. Lynch.

[50a]

Fifth Defense

60. The complaint is barred by the statute of limitations.

Sixth Defense

61. Plaintiff lacks standing to bring the action.

Seventh Defense

62. Plaintiff's admiralty tort and antitrust claims (counts II and III) are barred by law of the case, having previously been dismissed by this court.

WHEREFORE, defendants respectfully request the court to dismiss the amended complaint with prejudice and to award defendants the costs and disbursements of this action, together with such other and further relief as to the court may seem just and proper.

Answer to Amended Complaint

Dated: July 1, 1982

DOYLE & DOYLE
75 Federal Street
Boston, MA 02110
(617) 542-4666

THOMAS W. GLEASON
90 Broad Street, Suite 600
New York, NY 10004
(212) 425-3240

Counsel for Defendants

[51a]

CERTIFICATE OF SERVICE

CHARLES R. GOLDBURG, an attorney associated with the Law Offices of Thomas W. Gleason attorney for defendants hereby certifies that on July 1, 1985 he mailed a copy of the foregoing Answer To Amended Complaint to Nutter, McClennen & Fish, Federal Reserve Plaza, 600 Atlantic Avenue, Boston, MA 02210, counsel for plaintiff.

/s/ CHARLES R. GOLDBURG
CHARLES R. GOLDBURG